No. 96-429

Supreme Court, U.S.
FILED
NOV 20 1996
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MICHIGAN EDUCATION ASSOCIATION-NEA, *et al.*,

Petitioners,

v.

ROBERT G. BROMLEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 20, 1996

30 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

On a motion for summary judgment in an action under 42 U.S.C. § 1983 (1988) challenging the constitutionality of a union's calculation of an "agency fee," can the court deny the nonunion public employees discovery of the facts underlying that calculation, which are solely in the union's possession, and give great deference to prior findings of fact and approval of the union's accounting practices by an "impartial decisionmaker" under a procedure established by the union, where:

- the nonmembers had no role in selecting the "impartial decisionmaker";

- the decisionmaker has not been shown to possess any special competence in First-Amendment law;

- the record of the prior proceedings consists of summary documents and self-serving, hearsay testimony of union agents, admitted because the rules of evidence did not apply; and,

- the nonmembers were not entitled to discovery and compulsory process as a matter of right in those proceedings?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the First Amendment to the United States Constitution, set out in pertinent part in the Petition at 2, this case involves Article III of the Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988). We reproduce the pertinent parts of Article III and § 1983 in the Appendix to this brief.

COUNTERSTATEMENT OF THE CASE

I. The Facts.

Petitioner Michigan Education Association ("MEA") and its national affiliate, Petitioner National Education Association ("NEA"), represent public school and college employees in

Michigan in collective bargaining through local affiliates.[1] Pursuant to state law, the MEA and its subordinate locals have agreements with many employers that require as a condition of employment that employees who do not join the union pay an "agency shop" service fee in an amount not to exceed a member's dues. The MEA, NEA, and seven Petitioner locals (collectively, "the unions") each receive part of the fees. (Pet. App. at 3a-4a.)

The MEA has established procedures regarding the collection of service fees that apply to all of the unions. Applying those procedures, the MEA mailed all nonmembers subject to "agency shop" agreements a packet of materials demanding payment of fees for school year 1991-1992. This packet included summary information about the fees' bases and the MEA's procedure for challenging them. (*Id.* at 4a.).[2]

Plaintiffs are eighteen nonmembers subject to "agency shop" agreements negotiated by the unions in several different bargaining units. They and 218 others notified the unions, by checking the appropriate boxes on an objection form in the MEA's packet, that they wished to challenge the 1991-92 service fees under the MEA's procedure. (*Id.* at 3a-4a.) Several nonmembers expressly stated on the objection form that by participating in the MEA's procedure they did "'not . . . waive [their] rights to challenge the

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[1] There is no record evidence for Petitioners' claim that "each of the plaintiffs . . . received the benefits of collective bargaining," (Pet. at 3). Whether Respondents received any such "benefits" also is irrelevant.

[2] The record contains insufficient admissible evidence to support the unions' self-serving description of their "elaborate accounting and record-keeping system" for calculation of the fees or their claim that those calculations "are audited . . . in accordance with standard auditing procedures," (Pet. at 3-4.) The adequacy of the unions' cost accounting and audits are issues which the nonmembers could not contest on summary judgment without the discovery of the unions' underlying records that the district court denied. (*See* Pet. App. at 6a-8a, 12a-13a, 19a.)

amount of the fee in forums in addition to that provided under those procedures.'" (*Id.* at 4a-5a.)

Under the MEA's procedure, the American Arbitration Association ("AAA") conducted the challenge proceedings pursuant to its "Rules for Impartial Determination of Union Fees." Under those rules, the AAA appoints an "arbitrator"[3] who "is to be 'experienced in employment relations.'" The "rules contain no provision for peremptory challenges" to the appointment. Challengers have no right to pre-hearing discovery or to compel the testimony of union witnesses or production of union documents at the hearing. They can only ask the "arbitrator" at the hearing to exercise his discretion to require the unions to "'produce such additional evidence as the arbitrator may deem necessary.'" The "arbitrator" is to issue "a prompt decision 'in accordance with applicable law and the union's internal procedures.'" (*Id.* at 5a.)

The "arbitrator" appointed here, Barry C. Brown, was "not . . . shown to possess any special competence in First Amendment law." (*Id.* at 5a, 13a.) He conducted three days of hearings at which only three nonmembers appeared, one of whom is a named Plaintiff. No attorney appeared for the nonmembers. All witnesses who testified were the unions' agents. (*Id.* at 5a-6a.) "The case presented . . . rested primarily on hearsay—upon summaries of documents that were not presented in evidence and had not been made available for inspection by dissenters prior to the arbitration hearing." No nonmembers asked Brown to require the unions to submit additional witnesses or documents. (*Id.* at 6a, 12a.) Brown ruled that the fees were lawful in all respects. (*Id.* at 7a.)

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[3] We put the terms "arbitrator" and "arbitration" in quotes when referring to the MEA's procedure, because it is not arbitration as that term is defined in law. *See infra* p. 15.

II. The Proceedings Below.

This is an action for declaratory, monetary, and injunctive relief under 42 U.S.C. § 1983. The class action complaint alleges that the unions exacted fees from objecting nonmembers that included the costs of activities that may not constitutionally be charged to them under the First and Fourteenth Amendments to the United States Constitution, either because the unions misclassified expenses or failed to maintain records sufficient to meet their burden of proving chargeable costs. (Pet. App. at 2a-3a, 22a.)

The nonmembers served timely interrogatories and requests for production of documents. (*Id.* at 2a.) The interrogatories asked for the identity of the persons who participated in the calculations, and in the unions' auditors' examinations, of the schedules of chargeable and nonchargeable expenses on which the service fees were based; and for the amounts that the unions spent on each category of chargeable or nonchargeable activity used in its calculations. The requests for production asked the unions to produce the record of the AAA's proceeding; other documents underlying, used in, created during, or otherwise related to the unions' calculations, and their auditors' examinations, of the schedules of chargeable and nonchargeable expenditures; and the objection forms submitted by nonmembers who challenged the fees under the MEA's procedure. (*Id.* at 7a.)

The unions produced the "arbitration" record and the objection forms. However, they refused otherwise to answer the nonmembers' discovery requests and sought a protective order against all other discovery. The unions also moved for summary judgment, contending that the AAA record shows that the fees comply with all constitutional limitations. (*Id.* at 2a-3a, 7a.)

In a series of orders, the district court refused to permit additional discovery. The nonmembers moved under Federal Rule of Civil Procedure 56(f) to stay the Motion for Summary Judgment. They explained, with supporting declarations, "that

determination of the constitutionality of the unions' classification of expenses as chargeable to objecting nonmembers required 'specific identification of the activities involved;' and that discovery of these facts—facts solely within the possession of the unions—was essential for opposition to the summary judgment motion." However, the court denied a stay. (Pet. App. at 7a-8a.)

The court recognized that, "[b]ut for the arbitration proceedings and award, extensive discovery would be fully justified." (*Id.* at 25a-26a.) Nonetheless, it held that it should decide the Motion for Summary Judgment solely on the "arbitration" record, because the nonmembers initiated those proceedings, but failed to ask the "arbitrator" to require the unions to submit evidence beyond that which the unions chose to introduce. The court gave "great deference" to "arbitrator" Brown's factual findings and "approval of accounting procedures." (*Id.* at 28a-32a.)

The court also held that certain categories of activities the nonmembers challenged in opposing summary judgment are constitutionally chargeable and that, given the deference accorded Brown's award, there were no genuine issues of material fact for trial. (*Id.* at 32a-38a.) The court, therefore, confirmed its denial of further discovery, granted the unions summary judgment, and dismissed the nonmembers' Motion for Class Certification as moot. (*Id.* at 30a, 39a.)

The nonmembers timely appealed to the United States Court of Appeals for the Sixth Circuit from the district court's final judgment. (*Id.* at 8a.) The Court of Appeals ruled that the "right to have an Article III court adjudicate suits brought pursuant to § 1983 for vindication of rights secured by the First Amendment . . . cannot be foreclosed by non-statutory arbitration conducted by a privately appointed decisionmaker." (*Id.* at 10a-11a.) The court explained that "rules of evidence that treat hearsay with skepticism, and discovery procedures that allow litigants to probe their adversaries' cases in depth prior to hearing," are "safeguard[s] which . . . help[] 'insure that the government treads with sensitivity in areas freighted with First

Amendment concerns.'" (*Id.* at 12a, 14a (quoting *Teachers Local 1 v. Hudson*, 475 U.S. 292, 303 n.12 (1986).)

The Court of Appeals, therefore, concluded that "in accepting the arbitrator's endorsement of the unions' cost allocations without allowing discovery of the materials on which the calculations were based," "the district court clearly abused its discretion." (*Id.* at 12a, 18a.) The court vacated the summary judgment and remanded for further proceedings consistent with its opinion, including "a reasonable opportunity" for the nonmembers to conduct "meaningful discovery." (*Id.* at 18a-20a.)[4] The unions' Petition for Rehearing En Banc was denied with "no judge of th[e] court having requested a vote." (*Id.* at 67a.)

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among the Courts of Appeals on the Question Actually Presented Here, Because the Sixth Circuit Is the Only Circuit That Has Addressed the Scope of Judicial Review of an Agency Fee That Has Previously Been Reviewed by a *Hudson* Decisionmaker.

The Petition at 10 broadly describes the "question presented here" as that of "the role of the federal courts in adjudicating service fee claims after a *Hudson* arbitration" has occurred. The unions cite no other decision of a United States Court of Appeals that has decided this general question, or the precise discovery

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[4] The Court of Appeals also reversed the district court's holding that "defensive organizing costs" are chargeable; ruled "that there is a genuine issue of material fact, at least, as to whether certain categories of administrative costs that were treated as chargeable in their entirety should instead have been allocated proportionally between chargeable and non-chargeable activities"; and directed the district court to "revisit the class certification issue." (Pet. App. at 18a-20a.) The unions apparently do not seek review of these rulings. (*See* App. at 9 n.4.)

question presented here, contrary to the Sixth Circuit's decision in this case.

Instead, the unions cite a purported conflict among the Courts of Appeals on another question, not presented here,—"the exhaustion issue"—that they claim is "plainly linked" to the question presented here. (Pet. at 10.) The split in the Circuits on the exhaustion issue, if it exists at all, is not as clear or as even as the unions describe it. Nor is that issue necessarily linked to the question presented here of the scope of judicial proceedings under § 1983 after a *Hudson* decisionmaker has reviewed an agency fee.

A. In Cases Brought Under § 1983, the Circuits Have Uniformly Held That Exhaustion Is Not Required.

The unions cite *Hudson v. Teachers Local 1*, 922 F.2d 1306 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) ("*Hudson II*"), and *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509 (10th Cir. 1996), as holding that "objecting fee payers are required to exhaust a proper *Hudson* procedure, where it exists, before challenging a service fee in federal court." (Pet. at 12-13.) However, as the Court of Appeals concluded here, "the Seventh Circuit panel [in *Hudson II*] did not hold that exhaustion of the arbitral remedy could be required as a condition to the bringing of a § 1983 action." (Pet. App. at 15a). Moreover, *Lancaster* is distinguishable, because it was not brought under § 1983.

The Sixth Circuit noted here that certain passages in *Hudson II*, "[t]aken out of context, . . . sound[] like a powerful argument in favor of an exhaustion requirement." However, the "exhaustion issue was not before the [*Hudson II*] panel at all," because the "question being addressed . . . was whether the notice containing the union's explanation of the basis on which the amount of the agency fee had been determined was adequate to pass constitutional muster." In the passages that, out of context, seem to support an exhaustion requirement, the Seventh Circuit was merely responding to the plaintiffs' argument "that the correct-

ness of the amount had to be adjudicated in court *before the fee could be collected and escrowed in the first instance*." (Pet. App. at 15a.) *See Hudson II*, 922 F.2d at 1314.

The Sixth Circuit could have added that, had *Hudson II* held that exhaustion is required in these cases, it would have been wrong. This Court has held "categorically that exhaustion is not a prerequisite to an action under § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982); *see Felder v. Casey*, 487 U.S. 131, 146-50 (1988).

Consequently, the Third and Sixth Circuits, and the Ohio Supreme Court, have ruled that nonmembers may not be required to arbitrate their challenges to agency fees before suing under § 1983. *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992); *Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990); *Gibney v. Toledo Bd. of Educ.*, 532 N.E.2d 1300, 1303-05 (Ohio 1988). *Cf. Brosterhous v. State Bar*, 906 P.2d 1242, 1255-58 (Cal. 1995) (holding the same concerning compulsory bar members challenging the amount of their dues in a § 1983 case).

Hohe did not, as the Petition at 14 contends, "stake[] out an intermediate position on the exhaustion question." The Third Circuit merely pointed out that the Pennsylvania statute at issue there distinguished between "challenges to the chargeability of an activity" and "challenges to the amount of a chargeable fee." The court then held that the exhaustion requirement was "invalid **in its entirety**." *See Hohe*, 956 F.2d at 408-09 & n.4 (emphasis added).

The *Hohe* court did not rule that exhaustion could be required for challenges to the amount of a chargeable fee, as the unions argue. To the contrary, the Third Circuit ruled that the district court erred in leaving to arbitration in the first instance the nonmembers' challenges to the union's "classification of expenses as chargeable" and "to the amount of the chargeable fee." The court remanded *Hohe* for the district court to decide those issues.

See id. at 416, *rev'g in pertinent part*, 135 L.R.R.M. (BNA) 3026, 3028 (M.D. Pa. 1990).

In *Lancaster*, the Tenth Circuit interpreted *Hudson II* as requiring exhaustion and declined to follow *Tierney*. *See* 76 F.3d at 1521-22. However, that is mere dicta as to § 1983, because *Lancaster* was brought under § 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1988), not § 1983. 76 F.3d at 1513. Thus, *Lancaster* did not have to address the binding contrary authority of *Patsy* and *Felder*, and does not establish a split in the circuits on the exhaustion issue under § 1983.[5]

B. The Exhaustion Issue Is Not Necessarily Linked to the Discovery Issue Raised Here for the First Time.

This case does not present the exhaustion issue. The unions did not move for judgment on the ground that the nonmembers failed to exhaust the MEA's "arbitration" procedure. In granting the unions summary judgment, the district court expressly stated that the "'exhaustion' issue . . . is **not** within the scope of this opinion." (Pet. App. at 28a n.6 (emphasis added).) Admittedly, the Court of Appeals discussed it in response to the unions' argument that "*Hudson* arbitration would . . . become a waste of time and money unless its availability were held to foreclose normal pre-trial discovery." However, the court did not hold that exhaustion is not required, but simply recognized that it had already so held in *Tierney*. (*See id.* at 14a-16a.)

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[5] *Lancaster* is the only appellate decision under any statute holding that exhaustion of a union's *Hudson* challenge procedure is a prerequisite to a federal court action. The District of Columbia and Sixth Circuits have held that exhaustion cannot be required in an agency fee case brought under the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1988). *Abrams v. Communications Workers*, 59 F.3d 1373, 1382 (D.C. Cir. 1995); *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367-68 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1095 (1995).

The Court of Appeals' dicta concerning the exhaustion issue was not, as the Petition at 13 asserts, "a predicate for the decision below." The decision below was predicated on:

- the "right to have an Article III court adjudicate suits brought pursuant to § 1983 for vindication of rights secured by the First Amendment," (Pet. App. at 10a-11a);

- *Hudson*'s "recogni[tion] that '[t]he arbitrator's decision would *not* receive preclusive effect in any subsequent § 1983 action,'" and *Hudson*'s citation of *McDonald v. City of West Branch*, 466 U.S. 284 (1984), for that proposition, (Pet. App. at 11a (quoting *Hudson*, 475 U.S. at 308 n.21));

- this Court's holdings in *McDonald*, a case the Petition ignores completely, concerning the weight to be given an arbitral decision in the adjudication of § 1983 claims, (*id.* at 11a-13a);

- the particular "facts and circumstances" showing the inadequacy of the "arbitration" and the need for discovery here, (*id.*);

- *Hudson*'s holding that "procedural safeguards" are necessary in this context to "'insure that the government treads with sensitivity in areas freighted with First Amendment concerns,'" (*id.* at 12a-14a (quoting *Hudson*, 475 U.S. at 303 n.12)); and,

- the conclusion, shared by the Third Circuit and California Supreme Court, that "*Hudson* arbitration" is not "a waste of time and money," although it does not "foreclose normal pre-trial discovery," because, if "*Hudson* arbitrators do their job properly, . . . the probability is that some of these controversies will not reach the courts at all," (*id.* at 14a (citing *Hohe*, 956 F.2d at 409; *Brosterhous*, 906 P.2d at 1253)).

Thus, because the Court of Appeals' decision here was not predicated on the exhaustion issue, it does not directly conflict

even with what the unions incorrectly perceive to be the decisions of the Seventh and Tenth Circuits in *Hudson II* and *Lancaster* on that issue. Nor do the views of the Seventh and Tenth Circuits concerning "the exhaustion issues reflect[] a larger disagreement among the circuits . . . which goes to the very heart of the issues in the instant lawsuit," as the Petition at 13 asserts.

The heart of the issue here is whether a union can preclude discovery and judicial review of the facts underlying its calculation of an agency fee charged to objecting nonmembers by establishing a "non-statutory arbitration conducted by a privately appointed decisionmaker," (Pet. App. at 11a). Obviously, the answer to that question is "no" if exhaustion is not required. In that event, nonmembers can resort directly to court under § 1983 and obtain normal discovery and full judicial review of their claims. It logically follows that the same judicial processes must be available to nonmembers who first make a good faith, although unsuccessful, attempt to resolve their claims in a nonjudicial forum they have no legal obligation to use.

However, it does **not** necessarily follow that nonmembers can be denied normal discovery and full judicial review if exhaustion is a prerequisite to filing a lawsuit challenging agency fees. Neither *Hudson II* nor *Lancaster* states or implies such a limitation on judicial review in these cases.

Hudson II merely held that "*Hudson* did not contemplate that federal courts would be required, on the basis of the notice, to pass on the legality and accuracy of every element of the fee calculation before any fees could be collected." It also recognized that "the impartial decisionmaker's determination is not the final word on the challenge. *If* the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court." 922 F.2d at 1314. *Hudson II* says nothing about the scope of discovery and judicial review in such a subsequent action.

Lancaster, however, does imply that normal discovery and judicial review are to be afforded nonmembers who exhaust union

agency-fee remedies. *Lancaster*, in a passage the Petition at 14 quotes incompletely and out of context, states: "[w]ere we to hold there is no exhaustion requirement," "**we would more often** be forced to micromanage the fee calculation in every case challenging a union assessment. . . ." 76 F.3d at 1522 (emphasis added) (emphasized words omitted in Petition at 14).

In sum, no conflict, either direct or in principle, among the Courts of Appeals justifies granting the unions' petition. This is the first case in which a Court of Appeals has addressed the scope of discovery in a § 1983 action challenging the constitutionality of a union's agency fee after it has been reviewed in a "non-statutory arbitration conducted by a privately appointed decision-maker," (Pet. App. at 11a).

II. The Court of Appeals' Decision Is Wholly Consistent with this Court's Decisions in *Abood* and *Hudson*.

The unions argue that the Court of Appeals' decision "breaks faith with the rationale of *Abood [v. Detroit Board of Education*, 431 U.S. 209 (1977),] and *Hudson*." They assert that the "lesson" of those cases is that "so long as a union draws the constitutionally correct line between chargeable and nonchargeable expenditures, and applies that line through constitutionally required procedures, the First Amendment right 'to withhold support of ideological causes' is fully protected." (Pet. at 15-16 (quoting *Abood*, 431 U.S. at 241).) The unions do not explain how the First-Amendment right is fully protected if there is no judicial review in a truly adversary proceeding, where both sides have access to the underlying facts, about whether the union **in fact** has correctly **applied** the constitutionally correct line.

Abood does not directly address the scope of judicial review of a union's agency fee where the union has established a nonjudicial review procedure to comply with *Hudson*. It hardly could, because this Court did not specify that unions must "provide for a reasonably prompt decision by an impartial decisionmaker" until *Hudson*, 475 U.S. at 307. However, the

Court of Appeals' decision that the nonmembers are entitled to "discovery of the materials on which the calculations [of the fee] were based," (Pet. App. at 12a), is wholly consistent with *Abood*.

Abood recognized that drawing the line between constitutionally chargeable and nonchargeable activities involves "difficult" mixed questions of fact and law that cannot be determined without "factual concreteness and adversary presentation," requiring an "evidentiary record" that provides "specificity in the description of [the union's] activities." *See* 431 U.S. at 236 & n.33. *Abood* also acknowledged that only the unions possess the facts and records from which the proportion of chargeable to total union expenditures can be calculated. *Id.* at 239 n.40.

It necessarily follows from *Abood* that there is no truly adversary presentation on an adequate evidentiary record without "discovery procedures that allow [the nonmembers] to probe their adversaries' cases in depth prior to hearing," as the Court of Appeals held. (Pet. App. at 12a.) *See Lehnert v. Ferris Faculty Ass'n*, 556 F. Supp. 316, 318-20 (1983) (protective order denied), *judgment entered*, 643 F. Supp. 1306 (W.D. Mich. 1986), *aff'd*, 881 F.2d 1388 (6th Cir. 1989), *aff'd in part, rev'd in part on other grounds*, 500 U.S. 507 (1991). Nonmembers cannot possibly rebut or impeach the unions' witnesses and summary exhibits without prior access to the underlying records.

The Court of Appeals' decision also is wholly consistent with *Hudson*. *Hudson* held that the "nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, **fair**, and objective manner." 475 U.S. at 307 (emphasis added). A proceeding in which only one side to the dispute has access to the facts and determines what evidence will be introduced, and in which the decision is based on self-interested hearsay, is hardly fair.

Moreover, *Hudson* "presume[d] that the courts remain available as the ultimate protectors of constitutional rights" even

where a union adopts a procedure for challenges to agency fees. *Id.* at 308 n.20. *Hudson* also explicitly held that, if the procedure adopted was arbitration, the "arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action." *Id.* at 308 n.21. The unions erroneously assert that the Court stated this holding "without further explication." (Pet. at 12 n.6.) *Hudson* provided all the explication that is necessary by citing *McDonald v. City of West Branch* for this rule. *See* 475 U.S. at 308 n.21.

The Court of Appeals' decision faithfully applies the no-preclusion rule of *Hudson* and *McDonald*. *McDonald* and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which *McDonald* followed, establish that deferring to an arbitrator's decision gives it preclusive effect, contrary to *Hudson*.

McDonald held "that in a § 1983 action, a federal court should not afford res judicata or collateral-estoppel effect to an award in an arbitration proceeding." 466 U.S. at 292. *McDonald* characterized application of those doctrines as "giv[ing] preclusive effect to the arbitration award." *Id.* at 287. Moreover, *McDonald* described "a rule that would have required federal courts to **defer** to an arbitrator's decision," rejected under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, in *Gardner-Denver*, as a rule that would "**preclude** a subsequent suit in federal court." 466 U.S. at 288-89 (emphasis added); *see Gardner-Denver*, 415 U.S. at 55-60.

Hudson's ban on preclusion, or deference, is not limited to issues of law, as the unions would have it, (*see* Pet. at 14-16.) It includes factual issues. *McDonald* held "that in a § 1983 action, a federal court should not afford . . . collateral-estoppel effect to an award in an arbitration proceeding." *Id.* at 292. Collateral estoppel applies to issues of **both** fact and law. *See id.* at 287 n.5.

McDonald also held that "an arbitration proceeding cannot provide an adequate substitute for a judicial **trial**," and that it "'is the duty of courts to assure the **full** availability of th[e judicial] forum,'" *id.* at 292 & n.13 (quoting *Gardner-Denver*, 415 U.S.

at 60 n.21) (emphasis added). Trial would be unnecessary, and the judicial forum would not be **fully** available, if the court's only duty was to decide issues of law. *Gardner-Denver* held, without qualification, that the "federal court should consider the employee's claim *de novo*." 415 U.S. at 60.

The Petition at 16 n.8 relies on the comment in Henry P. Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 526 (1970) (footnote omitted), that "[s]o far as the first amendment is concerned, the task of historical factfinding may be left to administrative agencies, at least if . . . the agencies' procedures appear reasonably capable of ensuring reliable hearings." That comment is inapplicable here for several reasons.

To begin with, a decisionmaker appointed by the AAA is not an administrative agency. Indeed, "arbitration" under the MEA's procedure and the AAA's rules is not arbitration. The decisionmaker is chosen by a private organization unilaterally designated by the MEA, not by mutual agreement of the nonmembers and the unions.

"By definition, an arbitrator must be a person chosen by mutual agreement." An "essential element of arbitration" is "that the selection of the particular arbitrator or the method of selection of an arbitrator be established by **mutual agreement** between the parties." *Bethlehem Mines Corp. v. Mine Workers*, 344 F. Supp. 1161, 1165 (W.D. Pa. 1972) (emphasis added), *aff'd*, 494 F.2d 726 (3d Cir. 1974); *see Associated Plumbing & Mech. Contractors v. Plumbers Local 447*, 811 F.2d 480, 483-84 (9th Cir. 1987); *cf. Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201 (1991) ("arbitration is a matter of consent, . . . and will not be imposed on parties beyond the scope of their agreement").

Second, mere "historical factfinding" is not involved here. This case involves difficult questions of mixed fact and constitutional law about whether union expenses are "'germane' to collective bargaining activity," "justified by the government's vital policy interest in labor peace and avoiding 'free riders'," and,

most important, do "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991). As Monaghan said about a labor board, a labor arbitrator, "when dealing with questions of speech, is more likely to see the problem in terms of labor-management relations than in terms of first amendment interests." Monaghan, *supra* at 523.

Third, this is an action under § 1983. *McDonald* held that, "in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial." Therefore, in such an action, "a federal court should not afford [any] res judicata or collateral-estoppel effect to an award in an arbitration proceeding. . . ." 466 U.S. at 292.

Under *McDonald*, the "arbitral decision may [only] be admitted as evidence in a § 1983 action." The weight to be accorded that decision "'must be determined in the court's discretion with regard to the facts and circumstances of each case,'" including "'the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue [in the judicial proceeding], and the special competence of particular arbitrators.'" 466 U.S. at 292 & n.13 (quoting *Gardner-Denver*, 415 U.S. at 60 n.21).

The Sixth Circuit faithfully applied these factors in deciding that the district court erred in denying the nonmembers discovery outside the "arbitration" record and giving great deference to "arbitrator" Brown's factual findings and approval of the unions' accounting practices. The court determined that the MEA's procedure could not reasonably ensure reliable findings that "could appropriately be used as the basis of a definitive determination of the objectors' First Amendment claims," because the "case presented to the arbitrator rested primarily on hearsay," the nonmembers were denied any "meaningful pre-trial discovery," and the "arbitrator . . . has not been shown to possess any special competence in First Amendment law." (Pet. App. at 11a-13a.)

McDonald and *Gardner-Denver* held that § 1983 and Title VII, respectively, "permit an employee to have his claim considered in both the arbitral and judicial forums." *Gardner-Denver*, 415 U.S. at 54; *see McDonald*, 466 U.S. at 292. In filing an action under § 1983 or Title VII, "the employee is **not** seeking review of the arbitrator's decision," but "is asserting a statutory right **independent of the arbitration**." *Gardner-Denver*, 415 U.S. at 54 (emphasis added); *see McDonald*, 466 U.S. at 290.

It necessarily follows that, as in any independent cause of action, the nonmembers are entitled to pre-trial discovery that might enable them to oppose summary judgment with conflicting evidence that was not part of the arbitral record. That is clear from *Chandler v. Roudebush*, in which this Court reversed decisions denying a Title VII plaintiff discovery and granting summary judgment against her based solely on an administrative record. *See* 425 U.S. 840, 841-43, 864 (1976); *Eastland v. TVA*, 553 F.2d 364, 370 (5th Cir. 1977).

The unions argue, however, that allowing the nonmembers discovery of facts outside the "arbitration" record to enable them to oppose summary judgment "would defeat the purpose of *Hudson*," because the purpose of *Hudson*'s "arbitration" requirement "is to enable potential objectors to 'identify the impact of the governmental action on [their] interests.'" (Pet. at 16 (quoting *Hudson*, 475 U.S. at 303).) The unions confuse the purpose of *Hudson*'s notice requirement with that of *Hudson*'s "impartial decisionmaker" requirement.

The purpose of *Hudson*'s "impartial decisionmaker" requirement is not to enable "potential objectors" to "identify the impact of the governmental action on [their] interests." That is the purpose of *Hudson*'s notice requirement. *Compare* 475 U.S. at 303 *with id.* at 306. The purpose of *Hudson*'s "impartial decisionmaker" requirement is to give nonmembers who have objected "a fair opportunity . . . to assert a meritorious First Amendment claim" and have it "addressed in an expeditious, fair, and objective manner." *Compare id.* at 303 *with id.* at 307.

The Court of Appeals' decision is entirely consistent with the latter purpose. It concluded that the "arbitration" here denied the nonmembers a fair opportunity to assert their First-Amendment claims, because it lacked "rules of evidence that treat hearsay with skepticism, and discovery procedures that allow litigants to probe their adversaries' cases in depth prior hearing." (*See* Pet. App. at 12a-14a.)

Moreover, the purpose of *Hudson*'s "impartial decisionmaker" requirement was only to give nonmembers an **"opportunity"** to have their objections "addressed in an expeditious, fair, and objective manner." 475 U.S. at 303, 307 (emphasis added). First-Amendment due process requires that unions provide such an "opportunity" as a prerequisite to the "collection of agency fees." *See id.* at 307 n.20, 310.

However, it was not *Hudson*'s purpose to limit "ordinary judicial remedies," which *Hudson* presumed always "remain available." *See id.* at 307-08 nn.20-21. *Hudson* suggested arbitration "only as an expeditious means of resolving narrow questions of deductibility and avoiding infringement of First Amendment rights pending that resolution, not as a substitute for . . . a section 1983 action." *Brosterhous*, 906 P.2d at 1251; *see Hohe*, 956 F.2d at 409.

In short, the Court should deny the petition, because in *Hudson* and *McDonald* it effectively settled the question presented here in a way that compels the Court of Appeals' decision.

III. The "Practical Consequences" of the Sixth Circuit's Decision That the Unions Hypothesize Are Irrelevant and Chimerical.

The unions speculate that the "decision below opens the door to a new generation of [costly and complex] litigation" that "'would place an overwhelming and unrealistic burden on the courts.'" (Pet. at 18 (quoting *Hudson II*, 922 F.2d at 1314).) This hysterical speculation is both irrelevant and unwarranted.

First-Amendment due process requires unions to prove that the fees they charge objecting nonmembers include only constitutionally chargeable costs. *See Hudson*, 475 U.S. at 306. In enacting § 1983, Congress gave nonmembers a statutory right to require unions to meet that burden of proof in an Article III court. *See McDonald*, 466 U.S. at 290; Pet. App. at 10a. Any administrative inconvenience or expense involved in affording nonmembers that right is insufficient to justify denying or limiting it. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974); *Bell v. Burson*, 402 U.S. 535, 540-41 (1971).

Similar burdensomeness arguments could be made concerning many classes of cases that the federal courts handle. Should this Court have upheld school segregation in 1954, because declaring it unconstitutional would have clogged the federal courts with many complex, protracted, and costly cases overseeing the desegregation of the many school districts that were segregated then? The question answers itself.

Similar arguments that deferral to arbitration would "sav[e] . . . judicial time and expense" were made by the lower courts and defendants in *Gardner-Denver* and rejected by this Court. *See* 415 U.S. at 54, 59. Indeed, in *Gardner-Denver* and *McDonald* the Court concluded that allowing employees to litigate cases *de novo* under Title VII and § 1983 after arbitration probably would **reduce** the number of cases that the courts would face, for two reasons.

First, even though the judicial forum is potentially available, arbitration is "a relatively inexpensive and expeditious means for resolving . . . disputes" that "may well produce a settlement satisfactory to both" sides. Arbitration "may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum." *Gardner-Denver*, 415 U.S. at 55. The Court of Appeals reached the same conclusion here: "If *Hudson* arbitrators do their job properly, . . . the probability is that some of these controversies will not reach the courts at all." (Pet. App. at 14a.)

Second, the judicial forum should be fully available even after arbitration, because a

> deferral rule also might adversely affect the arbitration system . . . . Fearing that the arbitral forum cannot adequately protect their rights under [the civil rights statute], some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of . . . claims would thus be reduced, and the result could well be more litigation, not less.

Gardner-Denver, 415 U.S. at 59; *accord McDonald*, 466 U.S. at 292 n.11.

The unions' Petition itself shows the chimerical nature of their professed fears that a flood of costly and complex litigation will result from the Court of Appeals' decision. The unions identify no case, other than this, filed in the ten years since this Court decided *Hudson*, in which nonmembers have challenged a union's computation of the amount of an agency fee. (*See* Pet. at 17-18.)[6]

What the unions really fear, we submit, is not a flood of litigation. They fear full disclosure to their litigation opponents of the nature of their expenditures and review of their computations, under the rules of evidence, by an Article III judge qualified to determine the extent to which the state can compel speech and association. In short, the unions would like to hide in the dark, with only review on a union-selected, summary record by a person who normally resolves contract disputes and has no demonstrated expertise in First-Amendment law.

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[6] To be candid, as we point out *supra* pp. 8-9, the nonmembers did challenge the amount of the fee in *Hohe*. *See* 956 F.2d at 416. However, *Hohe* was primarily a challenge to the adequacy of the union's *Hudson* procedures. *See id.* at 402-12, 415.

CONCLUSION

No conflict among the Courts of Appeals exists concerning the discovery issue this case presents. Moreover, the Court of Appeals' decision is consistent with the relevant decisions of this Court. The petition should be denied. If a writ of certiorari is granted, the Court of Appeals' decision should be summarily affirmed.

Respectfully submitted,

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APPENDIX

United States Constitution, Article III

Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . .

Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.